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Chai Meng Kui v Ketua Pengarah Hasil Dalam Negeri

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HIGH COURT (MELAKA) — APPLICATION FOR JUDICIAL REVIEW
NO MA-25–6–08 OF 2018
MAIDZUARA MOHAMMED JC
30 OCTOBER 2019

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Civil Procedure — Judicial review — Judicial review — Respondent raised real property gains tax notice of assessment for additional sum — Applicant applied for judicial review to quash decisions of respondent — Whether there was clear lack of jurisdiction — Whether there was clear lack of jurisdiction — Whether there was serious breach of principles of natural justice — Real Property Gains Tax Act 1976 s 15(1)

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The applicant filed an application ('encl 9') against the respondent for judicial review for, among others, an order for certiorari to quash the decision by the respondent contained in the real property gains tax notice for additional assessment for the year of assessment 2017 for the sum of RM3,341,115.30 ('notice 2'). The issues for consideration were: (a) whether there was a clear lack of jurisdiction; (b) whether there was a blatant failure to perform some statutory duty; and (c) whether there was a serious breach of the principles of natural justice.

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Held, dismissing encl 9:

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(1) The language of s 15(1) of the Real Property Gains Tax Act 1976 ('RPGT Act') was clear and unambiguous. The respondent may make assessment or additional assessment on a taxpayer within the timeline prescribed therein. Notice 2 was issued by the respondent within its jurisdiction. Therefore, there was no clear lack of jurisdiction with regard to the issuance of notice 2 by the respondent (see paras 10 & 14–15).

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(2) The respondent was properly carrying out its statutory duty with regard to the issuance of notice 2 under s 15(1) of the RPGT Act (see paras 17–18).

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(3) The respondent provided the applicant with the reason for the respondent's decision to issue notice 2. The sufficiency or otherwise of the reason provided by the respondent for the issuance of notice 2 was not a material factor in considering the issue of whether there was a serious breach of the principles of justice. Also, at no point did the applicant chose to exercise his rights to be heard. He could not now complain that he was not given the opportunity to be heard by the respondent in respect

of notice 2. Therefore, the applicant had not discharged the burden to establish 'very exceptional circumstances' (see paras 23–24, 27 & 56).

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[Bahasa Malaysia summary]

Pemohon memfailkan permohonan ('lampiran 9') terhadap responden untuk semakan kehakiman, antara lain, perintah certiorari untuk membatalkan keputusan oleh responden yang terkandung dalam notis cukai keuntungan hartanah untuk taksiran tambahan untuk taksiran tahun 2017 dengan jumlah RM3,341,115.30 ('notis 2'). Isu-isu untuk pertimbangan adalah: (a) sama ada terdapat kekurangan bidang kuasa yang jelas; (b) sama ada terdapat kegagalan terang-terangan untuk melaksanakan beberapa tanggungjawab berkanun; dan (c) sama ada terdapat pelanggaran serius terhadap prinsip keadilan semula jadi.

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Diputuskan, menolak lampiran 9:

- (1) Bahasa s 15(1) Akta Cukai Keuntungan Harta Tanah 1976 ('Akta RPGT') adalah jelas dan nyata. Responden boleh membuat taksiran atau taksiran tambahan ke atas pembayar cukai dalam jangka masa yang ditentukan di dalamnya. Notis 2 dikeluarkan oleh responden yang berada di dalam bidang kuasanya. Oleh itu, tidak ada kekurangan bidang kuasa yang jelas mengenai pengeluaran notis 2 oleh responden (lihat perenggan 10 & 14–15).
- (2) Responden menjalankan tanggungjawab berkanun dengan betul mengenai pengeluaran notis 2 di bawah s 15(1) Akta RPGT (lihat perenggan 17–18).
- (3) Responden memberikan alasan kepada pemohon bagi keputusan responden untuk mengeluarkan notis 2. Kecukupan atau tidak alasan yang diberikan oleh responden untuk mengeluarkan notis 2 bukanlah faktor penting dalam mempertimbangkan isu sama ada terdapat pelanggaran serius prinsip keadilan. Tambahan lagi, pemohon yang tidak memilih untuk menggunakan haknya untuk didengar. Pemohon sekarang tidak dapat mengadu bahawa dia tidak diberi kesempatan untuk didengar oleh responden berkenaan dengan notis 2. Oleh itu, pemohon tidak melepaskan beban untuk membuktikan 'keadaan yang sangat luar biasa' (lihat perenggan 23–24, 27 & 56).]

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Cases referred to

ALF Properties Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri [2005] 5 MLJ 717; [2005] 3 CLJ 936, CA (refd)
Director-General Of Inland Revenue v Khoo Ewe Aik Realty Sdn Bhd [1990] 2 MLJ 415; [1990] 2 CLJ 160, SC (refd)
Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185; [1987] CLJ Rep 110, SC (folld)

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- A *Iskandar Coast Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2019] 5 MLJ 236, CA (refd)
National Land Finance Co-operative Society Ltd v Director General of Inland Revenue [1994] 1 MLJ 99; [1993] 4 CLJ 339, SC (refd)

B **Legislation referred to**

Real Property Gains Tax Act 1976 s 15(1)

S Saravana Kumar (Chris Toh Pei Roo with him) (Lee Hishammuddin Allen & Gledhill) for the applicant.

- C *Normareza bt Mat Rejab (Norsyamimi Bukhari and Nordiniana Sham with her) for the respondent.*

Maidzuara Mohammed JC:

- D [1] On 16 August 2018, the applicant was granted leave to commence judicial review against the respondent.

- E [2] On 21 August 2019, the applicant filed encl 9 against the respondent. Enclosure 9 is an application for judicial review for, among others, an order for certiorari to quash the decision by the respondent contained in the real property gains tax notice for additional assessment for the year of assessment 2017 for the sum of RM3,341,115.30 and dated 19 July 2018 which was deemed served on the applicant on 20 July 2018.

- F [3] On 4 September 2019, this court dismissed encl 9 filed by the applicant.

[4] The cause papers in respect of encl 9 are as follows:

- G (a) order dated 16 August 2018 for leave to file judicial review (encl 11);
(b) statement dated 13 August 2019 (encl 2);
(c) affidavit affirmed by Chai Meng Kui on 13 August 2019 (encl 3);
H (d) 'afidavit jawapan responden (1)' affirmed by Mohd Redzuan bin Ismail on 15 October 2018 (encl 13); and
(e) 'afidavit balasan' affirmed by Chai Meng Kui on 30 October 2018 (encl 14).

- I [5] In *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185; [1987] CLJ Rep 110 (SC) the Supreme Court held that:

A clear principle is reiterated here ie it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. Judicial review is always at the discretion of the Court *but where there is other avenue*

or remedy open to the applicant it will only be exercised in very exceptional circumstances. (Emphasis added.) A

and

In answer to the first question we would therefore hold that the discretion is still with the Courts but where there is an appeal provision available to the applicant certiorari should not normally issue unless there is shown a *clear lack of jurisdiction* or *blatant failure to perform some statutory duty* or in appropriate cases a *serious breach of the principles of natural justice.* (Emphasis added.) B

[6] The questions to be determined by this court are as follows: C

(A) was there a clear lack of jurisdiction? D

(B) was there a blatant failure to perform some statutory duty? and

(C) was there a serious breach of the principles of natural justice? E

WAS THERE A CLEAR LACK OF JURISDICTION? F

[7] In *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99; [1993] 4 CLJ 339 (SC) the Supreme Court held that a taxpayer is not to be taxed without clear words. F

[8] In the present case, the statutory provision in question is s 15(1) of the Real Property Gains Tax Act 1976 ('the RPGT Act').

[9] Section 15(1) RPGT Act 1976 states: G

[20] The Director General, where in respect of any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable with the tax, may within five years after the end of that year of assessment make on that person whatever assessment or additional assessment he considers to be appropriate. H

[10] The language of s 15(1) of the RPGT Act is clear and unambiguous. The respondent may make *assessment or additional assessment* on a taxpayer within the timeline prescribed therein. I

[11] It is common ground that on 17 January 2018, the respondent raised an RPGT notice of assessment dated 17 January 2018 for the year of assessment 2017 for the sum of RM2,205,384.90 ('notice 1'). Notice 1 can be found in encl 3 exh CMK 8.

- A** [12] It is also common ground that on 19 July 2018, the respondent raised an RPGT notice of assessment dated 19 July 2018 for an additional sum of RM3,341,115.30 ('notice 2'). Notice 2 can be found in encl 3 exh CMK 1.
- B** [13] The applicant does not challenge that notice 2 was issued within the time period prescribed by s 15(1) of the RPGT Act.
- [14] This court finds that notice 2 was issued by the respondent within its jurisdiction.
- C** [15] The answer to issue A is therefore in the negative — namely that there was no clear lack of jurisdiction with regard to the issuance of notice 2 by the respondent.
- D** WAS THERE A BLATANT FAILURE TO PERFORM SOME STATUTORY DUTY?
- [16] The jurisdiction of the respondent under s 15(1) of the RPGT Act is as discussed above.
- E** [17] This court holds that the respondent was properly carrying out its statutory duty under s 15(1) of the RPGT Act.
- F** [18] Therefore, this court finds against the applicant on issue B in that this court finds that the respondent was properly performing its statutory duty with regard to the issuance of notice 2.
- WAS THERE A SERIOUS BREACH OF THE PRINCIPLES OF NATURAL JUSTICE?
- G** [19] The applicant complained that the respondent did not provide the applicant with any reason for the respondent's decision to issue notice 2.
- H** [20] This court carefully reviewed the material disclosed before this court in respect of this application.
- [21] This court notes with interest that although the applicant repeated this complaint on numerous occasions, the applicant carefully avoided making specific mention of the contents of the respondent's letter dated 19 July 2018 (encl 13 exh MR1).
- I** [22] In the letter dated 19 July 2018, the respondent stated:
2. Berdasarkan semakan ke atas dokumen-dokumen sokongan, tarikh sebenar

syarikat Arah Menang Holdings Sdn Bhd menjadi syarikat haria tanah ialah pada tarikh Perjanjian Jual Beli ditandatangani iaitu pada 05.05.2015. Ini mengakibatkan taksiran cukai keuntungan harta tanah yang dibangkitkan pada 17.01.2018 adalah tidak mencukupi. Justeru itu, taksiran tambahan berdasarkan peruntukan subseksyen 15(1) Akta Cukai Keuntungan Harta Tanah 1976 dibangkitkan ...

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[23] This court finds that in its letter dated 19 July 2018 (encl 13 exh MR1), the respondent provided the applicant with the reason for the respondent's decision to issue notice 2. Further, the deponent of the respondent's encl 13 candidly admitted in para 15 the reason for the respondent's decision to issue notice 2.

C

[24] This court notes that the applicant is not satisfied with the reason given by the respondent for the respondent's decision to issue notice 2. However, the sufficiency or otherwise of the reason provided by the respondent for the issuance of notice 2 is not a material factor in considering issue C.

D

[25] The applicant also complained that the respondent did not provide the applicant with any opportunity to be heard in respect of notice 2.

E

[26] The deponent of the respondent's enclosure 13 stated on oath that the applicant (or their tax agent) never contacted the respondent regarding the letter dated 19 July 2018 or notice 2.

F

[27] This court finds that at no point did the applicant chose to exercise his rights to be heard. He cannot now complain that he was not given the opportunity to be heard by the respondent in respect of notice 2.

G

[28] Given the above, this court therefore finds against the applicant on issue C.

MISCELLANEOUS

[29] This court also reviewed the background facts in this case. The review will show that there were various issues of fact/mixed issues of fact and law where the applicant and the respondent took opposing positions.

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5 July 2015 and 18 September 2015

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[30] The applicant purchased 150,000 shares in Arah Menang Sdn Bhd ('Arah Menang'). There were two allotments — on 5 June 2015 and 18 September 2015.

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This statement is not disputed by the respondent.

12 June 2017

B

[31] The applicant disposed of 150,000 shares in Arah Menang to Pisidia Malaysia Sdn Bhd.

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The sale price was RM7,156,843.00 ('sale price'). The documents related to the disposal can be found in encl 3 exh CMK6.

D

This statement is disputed by the respondent. The respondent's position is that the applicant disposed 150,000 shares in Arah Menang to Pisidia Malaysia Sdn Bhd for RM20,692,593. According to the respondent, the applicant declared this amount in a RPGT computation furnished by the applicant with the applicant's CKHT Form 1B. The CKHT Form 1B can be found in encl 13 exh MR2.

E

11 August 2017

[32] The applicant filed a RPGT form for year of assessment 2017. The form can be found in encl 3 exh CMK 7.

F

This statement is not disputed by the respondent. But contrary to the contention by the applicant, the respondent highlighted that the form and supporting documents were not submitted 'without prejudice' by the applicant.

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[33] This court reviewed the form and the supporting documents (encl 3 exh CMK7) and the respondent is correct in highlighting that the form and supporting documents were not submitted on the basis of 'without prejudice' by the applicant.

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[34] This court also noted that that based on the contemporaneous documents disclosed, at that stage, the applicant declared that the applicant disposed of shares in a 'Real Property Company' ('RPC'). Therefore the applicant did not dispute that Arah Menang was a RPC.

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[35] The applicant stated that the applicant was advised by his tax agent that LHDN's position was the disposal related to shares in a RPC and so deemed to be chargeable assets.

This statement is not disputed by the respondent.

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17 January 2018

[36] The respondent raised notice 1 for the sum of RM2,205,384.90. Notice 1 can be found in encl 3 exh CMK8.

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This is common ground between the parties.

13 March 2018

C

[37] The applicant filed appeal to the Special Commissioners of Income Tax ('SCIT') against notice 1 (encl 3 exh CMK9).

D

This statement is not disputed by the respondent.

Early 2018–mid 2018

[38] The Applicant paid the amount stated in notice 1 to LHDN. The documents relating to this payment can be located in encl 3 exh CMK 10.

E

This statement is not disputed by the respondent.

F

19 July 2018

[39] The applicant received notice 2 for the additional sum of RM3,341,115.30.

G

This statement is not disputed by the respondent.

[40] On 8 August 2018, the applicant filed an appeal against notice 2. The notice can be located in encl 13 exh MR5.

H

This statement is not disputed by the respondent.

[41] This court notes that in his appeal against notice 2, the applicant is now asserting that Arah Menang is not a RPC.

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[42] The applicant's position is that Arah Menang is a company which is principally engaged in the business of housing development. The applicant urged this court to make reference to Arah Menang's audited financial

A statements for the financial years 2015, 2016 and 2017. The audited financial statements for these year can be found in encl 3 exhs CMK 2–CMK4.

B [43] This court is not in a position to ascertain from the documents disclosed, and therefore unable to come to a determination, with regard to Arah Menang’s intention when it purchased the property.

C [44] In *ALF Properties Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri* [2005] 5 MLJ 717 at p 745; [2005] 3 CLJ 936 (CA) at p 963, the Court of Appeal cited the decision of Gunn Chit Tuan SCJ (as he then was) in *Director-General Of Inland Revenue v Khoo Ewe Aik Realty Sdn Bhd* 2 [1990] MLJ 415; [1990] 2 CLJ 160, SC where His Lordship held:

D ... In this case the question was whether or not an adventure in the nature of trade was being carried on and *the Special Commissioners had to consider all the circumstances of the case and their finding would be one of fact*. The broader question as to the meaning of adventure in the nature of trade would however be one of law. (Emphasis added.)

E [45] The Court of Appeal in *ALF Properties* also held at page that:

F It is not safe for the Special Commissioners to come to a conclusion that the appellant’s principal activity is dealing in property merely on the ground that it is one of the stated objects of the appellant as found in its Memorandum and Articles of Association. To come to a safe conclusion one has to go into the activities of the appellant whether in the past or in the present to find out whether the activities are one of the stated objects of the appellant.

G [46] In the present case, Arah Menang’s intention when it purchased the property is to be determined as a question of fact. Thereafter, whether Arah Menang is a RPC is to be determined as a mixed question of fact and law.

H [47] Tied to these questions is the question of whether the applicant was a speculator when the applicant purchased shares in Arah Menang — this question will also need to be examined and determined.

I [48] This court also noted that based on notice 1 and notice 2, the total RPGT payable by the applicant is in the sum of RM5,546,500.20.

[49] The applicant’s position is that *gains for disposal* is only RM7,006,843.

[50] The respondent disputes that *gains for disposal* only RM7,006,843. The respondent’s position is that based on CKHT computation (encl 3 exh CMK 1), *profits taxable* for the applicant is RM18,488,334.

[51] The applicant also submitted that ultimately, the respondent assessed RPGT payable by the applicant at 79%. A

[52] This contention is disputed by the respondent. The respondent's position is that the applicant was taxed on the applicable rate of 30%. The respondent's computation can be found in encl 3 exh CMK1. The respondent's explanation can be found in encl 13 para 16 et seq. B

[53] The applicant contended that there are no facts in dispute with regard to encl 9 (encl 3 para 4). Contrary to the applicant's contention, it is clear that there are various issues of fact/mixed issues of fact and law which are disputed. C

[54] This court holds that such issues of fact/mixed issues of fact and law are best ventilated before, heard and determined by the Special Commissioners for Income Tax. D

[55] As stated above, the applicant filed an appeal against (notice 1 on 13 March 2018 and) notice 2 on 8 August 2018. The applicant is at liberty to canvass all or any of such issues before the Special Commissioners for Income Tax. E

See: *Iskandar Coast Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2019] 5 MLJ 236 — decision of CA delivered on 13 June 2019 in Civil Appeal No W-01(A)-392-11 of 2017 at pp 10-11. F

CONCLUSION

[56] This court holds that the applicant has not discharged the burden on the applicant to establish 'very exceptional circumstances'. G

[57] Given the above and in light of the decision of the Supreme Court in *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185; [1987] CLJ Rep 110 (SC) by which this court is bound, encl 9 is dismissed.

[58] This court also ordered that costs in the sum of RM10,000 shall be paid by the applicant to the respondent. H

Enclosure 9 dismissed.

Reported by Nabilah Syahida Abdullah Salleh I